

Appl. No. 10/630,493
Docket No. AA541MC
Amdt. dated July 13, 2007
Reply to Office Action of May 15, 2007
Customer No. 27752

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REMARKS

Claim Status

Claims 1-27 are pending in the present application. No additional claims fee is believed to be due.

Claim 1 has been renumbered in order to improve clarity.

Claims 21-27 have been withdrawn as a result of an earlier restriction requirement.

These changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

Rejection Under 35 USC §112, First Paragraph

The Office Action states, "The term 'from about', 'at least about' are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, one of ordinary skill in the art would not be reasonably apprised of the scope of the invention, because one of skill will not be able to determine which term is in control." The Office argues that the claims lack clarity as to "whether 'from' (a lower limit) or 'about' (broadening limitation, both higher and lower) controls the metes and bounds of the phrase 'from about'." Applicant asserts that the claim language of "from about X to about Y" is clear as written to an ordinary person. The claim term recites a lower limit of X and an upper limit of Y. Each variable – X and Y – includes the term "about" which serves as a term of approximation. *See Merck & Co. v. Teva Pharmaceuticals USA Inc.*, 73 U.S.P.Q.2d 1641, 1648 (Fed. Cir. 2005) ("about" should be given the ordinary and accepted meaning of "approximately").

The Office also argues that "Regarding 'at least' (a lower limit) or about (broadening limitation, both higher and lower) it is unclear what controls the metes and bounds of the phrase 'at least about'." Applicant asserts that the claim language of "at least about Z" is clear as written to an ordinary person. The claim term recites a lower limit of Z. The lower limit of Z includes the term "about" which serves as a term of approximation.

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Applicant respectfully requests withdrawal of the rejection.

Rejection Under 35 USC §103(a)

Claims 1-11 and 17-19 have been rejected under 35 USC §103(a) as being unpatentable over U.S. Patent No. 5,997,887 to Ha et al ("Ha") taken with U.S. Patent No. 6,337,066 to Jacquier ("Jacquier") and European Patent Application No. 0063875 to Okamura ("Okamura") in view of U.S. Patent No. 4,076,663 to Masuda et al ("Masuda") taken with U.S. Patent No. 6,548,075 to Bengs et al. ("Bengs"). For clarity purposes, the rejection will be analyzed on a claim by claim basis.

Claim 1 and 11 - In support of the rejection, the Office states, "Ha et al. teaches with regards to the instant claim 1 a liquid composition comprising a water insoluble substrate (see col. 18, lines 35-38 [sic] as a lipid or oily material-thus oils are hydrophobic in nature and is commonly known to one of ordinary skill in the art, reflective particulate material, wherein the reflective particulate has a particle size of 100 nm (see col. 3, lines 5-10), a water soluble thickening agent wherein the thickening agent is - xanthan gum." With regard to Okamura, the Office states, "Okamura teaches a cosmetic face mask- having a water- insoluble substrate-is made of a non-woven material (see page 5, lines 15-1 8) such as cotton yarn, synthetic etc as in claims 1 and 11." Furthermore, the Office asserts that "Bengs et al., teach polysaccharides products in cosmetics (see col. 1, lines 22-50) wherein these polysaccharides have been used to treat skin to produce a pleasant feel (see col.1, lines 49 and col. 10, lines 9-24)." With regard to Claims 1 and 11, the Office concludes, "Although the Ha et al. reference did not teach the water insoluble substrate as

cotton yarn, synthetic etc as in claims 1 and 11, one of ordinary skill in the art would have been motivated to substitute the oily or lipid base with that of Okamura, use the materials of Okamura based on the end product wanted by the one of ordinary skill in the art and combine with the teachings of Bengs et al." Applicant traverses the rejection.

Ha is directed to a skin care composition containing charged particulate material in a thickened, hydrophilic carrier. *Abstract*. Applicant can find no teaching in Ha directed to a water insoluble substrate. However, the Office appears to be arguing that

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Ha's disclosure of a lipid or oily material is synonymous with a water insoluble substrate. The Office states, "Ha et al. teaches with regards to the instant claim 1 a liquid composition comprising a water insoluble substrate . . . as a lipid or oily material." The teaching of Ha is directed to the hydrophobic phase of an emulsion. It does not follow that this hydrophobic phase (*e.g.*, oil) teaches a substrate.

Next, the Office suggests that the material of Okamura can be substituted in for the "oily or lipid base" of Ha. However, as presented in the paragraph above, Ha does not teach a substrate. The Office is attempting to substitute the oil phase of an emulsion (as taught by Ha) with a nonwoven, paper, or fabric (as taught by Okamura). Clearly, one skilled in the art would not make such a substitution. Such a substitution would destroy the emulsion as intended by Ha.

The Office combines the teaching of Ha and Okamura with Bergs. Applicant is unclear on the Office's reliance on Bergs. The Office states, "Bergs et al., teach polysaccharides products in cosmetics . . . wherein these polysaccharides have been used to treat skin to produce a pleasant feel." It is unclear to what limitation of what claim this teaching pertains. The Code of Federal Regulations states, "The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified." 37 C.F.R. § 1.104(c)(2).

The Office has not established a *prima facie* case of obviousness because all the elements of Claim 1 have not been sufficiently taught by the cited references.

Claim 5 – The Office states, "With regards to 5, the reference teaches starch is condensed with long chain alcohol resistant (see col. 19, lines 39-41), wherein the C8- 30 having a sugar moiety (see col. 19, lines 40-42) connected via an ether linkage on the other end with a fatty alcohol to aid in dispersing the one phase (discontinuous) to the other phase (continuous) thereby been used as a dispersion characteristics. (Note this is a non-starch polysaccharide). Therefore one of ordinary skill in the art would have been motivated to use such a starch that would not only bind the components together but will also protect the face." The Office's argument is not clear. Ha teaches that useful nonionic surfactants "can be broadly defined as condensation products of long chain

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alcohols, e.g. C8-30 alcohols, with sugar or starch polymers, i.e., glycosides." Col. 8, lines 38-40. The Office concedes that "this is a non-starch polysaccharide." If, as the Office concedes, Ha discloses a non-starch polysaccharide, the Office cannot reasonably argue that Ha teaches a resistant starch.

The Office further argues, "The reference uses starch polymers (see col. 19, lines 39-41) such as glycosides. By definition resistant starch is defined as starch that does not absorbed [sic] in the small intestine. Note that polyglycosides s [sic] are formed by linking the carbohydrate moiety by $\alpha(1\rightarrow4)$ bonds. Therefore the starch used in the reference is a resistant starch (see explanation of a resistant starch above) (resistant starches are any starch that is not digested in the small intestine but passes to the large bowel for fermentation a non-starch polysaccharide (see abstract), as evident by Nils-Georg Asp (1987;vol. 9 (1) Abstract only)." The Office's conclusion does not follow from the Office's presumptions. The Office presents:

- "[Ha] uses starch polymers such as glycosides" – Ha uses starch polymers as a reactant to form a nonionic surfactant. The Office has not taught that Ha uses the starch in the topical composition.
- "Resistant starch is defined as a starch that does not absorbed [sic] in the small intestine."
- "polyglycosides s [sic] are formed by linking the carbohydrate moiety by $\alpha(1\rightarrow4)$ bonds
- "Therefore the starch used in the reference is a resistant starch"

The conclusion that the starch used in Ha (as a reactant) is a resistant starch does not flow from the second and third points. The Office has failed to present a *prima facie* case of obviousness. The Office is reminded that, in establishing a *prima facie* case of obviousness, case law clearly places the "burden of proof on the Patent Office which requires it to produce the factual basis for its rejection of an application under sections 102 and 103." *In re Warner*, 379 F.2d 1011, 1016 (CCPA 1967).

In its continued arguments, the Office states, "Jacquier, teach the use of resistant starch under the name resistamyl-E2 (see col. 2, line 42), in a cosmetic formulation for treating skin, therefore one of ordinary skill in the art would be motivated to use a

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resistant starch in a mask because it is used in a cosmetic formulation." Jacquier teaches that the composition is in the form of a powder having an average particle size from 50 to 600 μm . Col. 2, lines 8-9. Claim 5 is dependent from Claim 2 which recites an average particle size of from about 100nm to about 10 μm . Jacquier does not teach each and every limitation in the claim.

Claim 8 – The Office argues that Ha teaches a composition that "vitamin C (ascorbic acid (see col. 27, lines 63-64) and vitamin B3 (see col. 25, lines 65-67) as in the current claim 8." While Ha generically discloses vitamin C, vitamin B3, and a list of many other optional ingredients. There is no teaching of a composition having both an ascorbic acid derivative and a vitamin B3 derivative.

Claim 10 – In support of the rejection, the Office state, "As evidenced by the cited prior art adding perfume to the composition as taught by Masuda. et al. that perfumes when added will maintain their effects for a longer time when the resins are impregnated with them, especially with the use of agricultural product (see col. 5, line 65 bridging col. 6, lines 1-2)." Masuda is directed to a highly water-absorbent resin that may be used in absorbent dressings or for agricultural purposes. Col. 5, line 57 to col. 6, lines 2. Masuda teaches that perfumes will last longer when impregnated in the water-absorbent resin. However, there is no reasoning provided for why one skilled in the art would include water absorbent resins into a topical composition comprising a hydrophilic liquid carrier (e.g., water) such as disclosed by Ha. The Office has failed to establish a *prima facie* case of obviousness.

Claims 12-16 and 20 - No rejection based on cited art was presented for Claims 12-16 and 20.

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Double Patenting

Claims 1-15 are provisionally rejected on the grounds of nonstatutory obviousness-type double patenting over claims 1-13 of copending Application No. 10/622,518. The Office states:

The copending application recites A [sic] mask composition comprising:

- (1) a water insoluble substrate; and
- (2) an emulsified liquid composition comprising:
 - (a) an oily component;
 - (b) a hydrophilic surfactant;
 - (c) a water-soluble thickening polymer which provides the liquid composition a viscosity of from about 500mPa-s to about 60,000mPa-s; and
 - (d) an aqueous carrier.

Since the term comprising is used the claims are interpreted as having the components that are missing in any one of the claims one of ordinary skill in the art would be motivated to modify the facial mask add or remove agent depending on the purpose. The claims of the co-pending application is an obvious variation of the claims of the instant application. In view of the foregoing, the copending application claims and the current application claims are obvious variations.

MPEP § 804(II)(B) states, "[T]he analysis employed in an obviousness-type double patenting rejection parallels the guidelines for analysis of a 35 U.S.C. 103 obviousness determination." The Office provides no valid reasoning for why one skilled in the art would modify the subject matter presented in the claims of Application No. 10/622,518. The Office is seemingly arguing that the open-ended term "comprising" can be read to teach anything. Clearly this is not accurate. If it were accurate, any claim using "comprising" (which most patent claims use) could be read to teach virtually everything. The Office has failed to establish a *prima facie* case of obviousness by not providing an adequate factual basis for the proposed modification to the '518 application.

It should be recognized that the obviousness-type double patenting rejection is not applied to claims 16-20. Neither an obviousness-type double patenting rejection nor a rejection based on cited art was made against Claims 16 and 20. Therefore, Claims 16 and 20 are believed to represent allowable subject matter.

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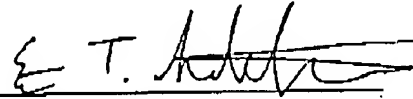
Conclusion

This response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the cited references. In view of the foregoing, entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims are respectfully requested.

Respectfully submitted,

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Date: July 13, 2007
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